HISHAM TAN SRI HALIM v. TEH FARIDAH AHMAD NORIZAN & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
QUAY CHEW SOON JC
[SUIT NO: WA-23NCvC-33-09-2017]
17 DECEMBER 2020

TORT: *Defamation – Slander – Claim for damages – Claimant and wife involved in matrimonial dispute – Wife's family members uttered words against claimant in presence of other family members and third parties – Whether words uttered defamatory of claimant – Whether words uttered referred to claimant – Whether words uttered transmitted to third parties – Whether slander proven – Whether defences of fair comment and qualified privilege available – Whether words uttered actuated by malice – Factors taken into account in assessing damages*

TORT: *Trespass – Trespass to property – Claimant and wife involved in matrimonial dispute – Wife's mother entered claimant's house and removed certain items from house – Whether resident of and had access to house – Whether permitted to be in house – Whether presence known to and at invitation of claimant – Whether wife's mother trespasser – Whether trespass proven*

TORT: *Conversion – Elements of – Claimant and wife involved in matrimonial dispute – Wife's mother entered claimant's house and removed certain items from house – Whether items belonged to claimant or claimant's wife – Whether wife's mother merely retrieving wife's item – Whether elements of conversion proven*

TORT: *Damages – Claim for – Damages arising from physical injury – Claimant and wife involved in matrimonial dispute – Wife's family members uttered words against claimant in presence of other family members and third parties – Allegation that claimant acted with violence and extreme physical force during incident – Whether allegations proven*

The plaintiff and his wife married in 2007 and were blessed with two daughters ('children'). Following a dispute, the plaintiff's wife left their matrimonial home ('apartment') with the children, one aged four ('older child') and the other aged two ('younger child') at the material time, and went to stay at her mother's ('second defendant') house. She then filed for divorce at the Syariah Court and obtained interim custody of the children. The plaintiff was given overnight visitation rights for two nights each week. The plaintiff received a call from a police inspector, one day, informing him that the plaintiff's wife had lodged a police report, alleging that the older child had been molested by the driver employed by the plaintiff's family ('driver') whilst the children were with the plaintiff and his family at the plaintiff's father's house. The plaintiff's wife and her family later prevented the plaintiff from seeing the children and from being involved in the investigation of the alleged molestation, including the clinical examination and interview of the

older child, despite being allowed by the police. The plaintiff's wife later informed the plaintiff that the older child was under the care of the Jabatan Kebajikan Malaysia ('JKM') and, hence, the plaintiff was prevented from taking the children for usual overnight visitation. The plaintiff immediately contacted JKM and spoke to one of its officers ('Nithiah'), who invited the plaintiff to the hospital where the older child was undergoing a clinical examination. Although the younger child was well and not under the care of JKM, the plaintiff's wife and her family had briefly admitted the younger child into the hospital too. The plaintiff went to the hospital, on the same day, and it was agreed that the plaintiff be allowed to take the younger child home the next day. The plaintiff came the next day and this was when the events that formed the subject matter of the present suit unfolded. According to the plaintiff, as he was trying to get the younger child, the second defendant and her sister ('first defendant') uttered defamatory words against the plaintiff in the presence of the children, two relatives, a domestic helper, Nithiah, the hospital's director and a number of doctors and nurses ('incident'). The plaintiff commenced the present action against (i) the defendants for slander where the plaintiff sought general, aggravated and exemplary damages and an apology from the defendants; and (ii) the second defendant for conversion and trespass to property and sought the return of the property or, alternatively their value in the sum of RM626,824.27 and damages. According to the plaintiff, the second defendant had entered the apartment with a few workers, even though she was not a resident of the apartment and did not have an entry access card to the same, to remove the plaintiff's belongings ('items') and her actions constituted an act of trespass. The plaintiff then asserted that the second defendant appropriated his items unlawfully, without his consent and, as such, was guilty and liable to compensate the plaintiff for the loss of the items. In defence, the defendants pleaded fair comment and qualified privilege. The defendants relied on the following facts in support of their fair comment defence: (i) the older child complained to the plaintiff's wife that she was molested by the driver and, following that, the plaintiff's wife lodged a police report; (ii) the older child was admitted to the hospital to undergo physical and emotional examination. In defence to the plaintiff's claim for conversion and trespass, the second defendant submitted that (i) the items belonged to the plaintiff's wife and she had requested the second defendant's assistance to go to the apartment to retrieve them; and (ii) she often stayed at the apartment to babysit the children. The defendants further counterclaimed against the plaintiff for acting with violence and extreme physical force during the incident, resulting in injury to them.

Held (allowing claim in part; dismissing counterclaim):

(1) The plaintiff had to establish three elements in order to prove his case for slander, namely that the words (i) were defamatory; (ii) referred to him ('limb (ii)'); and (iii) were transmitted to third parties ('limb (iii)'). The words (i) were capable of bearing defamatory meaning and were

indeed defamatory of the plaintiff; (ii) tend to lower the plaintiff in the estimation of right-thinking members of society, generally; (iii) exposed the plaintiff to ridicule, contempt or hatred; and (iv) were a direct attack on the plaintiff's behaviour, character, integrity and trustworthiness. Limbs (ii) and (iii) were undisputed. The defendants themselves admitted in court that the words were about the plaintiff and the contents of the words made it clear. The words were uttered by the defendants in the presence of and heard by those present during the incident. This was evident from the video recording of the incident, testimonies of witnesses and the admission of the defendants during cross-examination. Therefore, the defendant had committed the tort of slander against the plaintiff. (paras 23-25, 28 & 30)

(2) To succeed in the defence of fair comment, the defendants must establish that (i) the words complained of were comment, although they may consist or include inferences of fact; (ii) the comment was a matter of public interest; (iii) the comment was based on facts; and (iv) the comment was one which a fair-minded person could honestly make on the facts proved. The defendants failed to discharge their burden of proving the defence of fair comment for the following reasons (i) the words were not a matter of public interest as the matter was essentially a family matter; (ii) the words were not based on true facts. The alleged molestation was not proven at trial; and (iii) even if the alleged molestation was true, the words were not one which a fair-minded person could honestly make, seeing as the plaintiff was neither the accused nor the suspect. The words were essentially criticisms and accusations; not opinions or comments. The language used by the defendants was also rather extreme. (paras 33-36 & 42-44)

(3) Qualified privilege is afforded to those who make defamatory statements in the discharge of some public or private duty, whether legal or moral, or in the conduct of their own affairs, in matters where their interest is concerned; but only if the publication is derived from right and honest motives. Qualified privilege depends on the occasion upon which the communication is made and not the communication itself. The defendants failed to discharge their burden of proving the defence of qualified privilege. Although the defendants had an interest or a moral and social duty to communicate the alleged molestation to the plaintiff, neither of them attempted to speak privately to the plaintiff about it. Instead, they uttered the words in the presence and within earshot of various parties. This did not fit the occasion at all. (paras 47-49 & 51)

(4) The defendants could not rely on the defences of fair comments and qualified privilege because the words were actuated by malice. Malice defeated the said defences. The defendants were motivated by ill-will arising from their bad relationship and unhappiness with the plaintiff. Their intention was to vent personal spite against the plaintiff. (paras 52 & 54)

(5) Several factors should be taken into account in assessing damages, namely (i) the gravity of the allegation; (ii) the size and influence of the circulation; (iii) the effect of the publication; (iv) the extent and nature of the plaintiff's reputation; (v) the behaviour of the plaintiff and the defendants; and (vi) the trend of awards. This was not a case where the words complained of were published to all and sundry by means of a newspaper publication, bringing it into public domain in permanent form. Here, the utterance of the words was restricted to about a dozen or so individuals. The size, influence and effect of the dissemination of the words were therefore limited to that extent. The words were also uttered in the context of a family altercation. While there were some third parties, they were people who were likely cognisant of the matrimonial dispute between the plaintiff and his wife. This mitigated the injury to the plaintiff's reputation. The defendants appeared regretful over the incident. Even though this did not excuse their slander against the plaintiff, it counted towards quantum of damages. The plaintiff was awarded RM60,000 in general damages. A separate award for aggravated damages was not warranted. The award for exemplary damages was declined as the defendants' conduct were not outrageous or calculated to make a profit for themselves. The plaintiff's prayer for an apology was also declined as general damages would suffice. (paras 71-77)

(6) A trespasser is one who wrongfully enters on land in the possession of another and has neither the right nor permission to be on the land. A trespasser is one who goes on the land without invitation of any sort and whose presence is either unknown to the proprietor or, if known, is practically objected to. The plaintiff had not proven trespass against the second defendant. The second defendant could hardly be described as a trespasser. By the plaintiff's own admission, the second defendant was permitted to be in the apartment. The second defendant was not someone who wrongfully entered the apartment. On the contrary, she had permission to be in the apartment and was invited to stay there to babysit the children. Her presence there was known to and at the invitation of the plaintiff. (paras 81 & 82)

(7) Conversion occurs when a person, without authority, receives or takes possession of another's goods, with the intention of asserting some right or dominion over them or deals with them in a manner inconsistent with the right of the true owner; provided that there is an intention on the person so dealing with them to negate the right of the true owner or to assert a right inconsistent with it. The plaintiff had lodged a police report regarding the loss of the items but the police classified the case as 'No Further Action'. The items, by nature, were not things that the plaintiff would use or buy for himself. They consisted of mainly ladies' handbag, bracelets and children's toys. It was believable that the items belonged to the plaintiff's wife or were bought by the plaintiff for her. The second defendant was merely helping to retrieve the items for, and with the

authority of, the true owner, the plaintiff's wife. The second defendant did not negate the right of the true owner of the items or assert a right inconsistent with it. Therefore, the plaintiff had not proven conversion against the second defendant. (paras 83, 84 & 88)

(8) The defendants' counterclaim was unsubstantiated. Evidence showed that the plaintiff was carrying the younger child and therefore could not, and did not, act with physical force to cause injury to the defendants. Furthermore, there was no medical report to support the defendants' allegations of injury. In fact, the second defendant admitted, during cross-examination, that the plaintiff did not act with violence to cause injury, as alleged. (para 85)

Case(s) referred to:

Ayob Saud v. TS Sambanthamurthi [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321 HC ***(refd)***
Bre Sdn Bhd & Ors v. Tun Datuk Patinggi Hj Abdul Rahman Ya'kub [2005] 2 CLJ 645 CA ***(refd)***
Cassell & Co Ltd v. Broome [1972] 1 All ER 801 ***(refd)***
Chin Choon v. Chua Jui Meng [2005] 2 CLJ 569 CA ***(refd)***
Chok Foo Choo v. The China Press Bhd [1999] 1 CLJ 461 CA ***(refd)***
Cohen v. McEvoy [2001] WASC 349 ***(refd)***
Dato' Dr Low Bin Tick v. Datuk Chong Tho Chin & Other Appeals [2017] 8 CLJ 369 FC ***(refd)***
Dato' Seri Mohammad Nizar Jamaluddin v. Sistem Televisyen Malaysia Bhd & Anor [2014] 3 CLJ 560 CA ***(refd)***
Dato' Sri Mohd Najib Tun Hj Abdul Razak & Anor v. Mohd Rafizi Ramli & Another Appeal [2018] 4 CLJ 41 CA ***(refd)***
Datuk Harris Mohd Salleh v. Datuk Yang Teck Lee & Anor [2018] 1 CLJ 145 FC ***(refd)***
Financial Information Services Sdn Bhd v. Hj Salleh Hj Janan [2012] 8 CLJ 885 FC ***(refd)***
Francis Kimsai v. Judip Kini [2012] 4 CLJ 774 HC ***(refd)***
Henry Ong Keng Sem v. Patrick Ong King Kok [2008] 4 CLJ 276 HC ***(refd)***
International Times & Ors v. Leong Ho Yuen [1980] 1 LNS 31 FC ***(refd)***
Karpal Singh Ram Singh v. DP Vijandran [2001] 3 CLJ 871 CA ***(refd)***
Leong Hong Khie v. PP [1984] 1 LNS 172 FC ***(refd)***
Liew Yew Tiam & Ors v. Cheah Cheng Hoc & Ors [2001] 2 CLJ 385 CA ***(refd)***
Lynch v. Knight (1861) [1861-73] All ER Rep Ext 2344 ***(refd)***
Mahadevi Nadchatiram v. Thiruchelvasegaram Manickavasegar [2003] 4 CLJ 20 FC ***(refd)***
Pardeep Kumar Om Parkash Sharma & Anor v. Abdullah Sani Hashim & Another Appeal [2008] 1 LNS 669 CA ***(refd)***
Raub Australian Gold Mining Sdn Bhd v. Hue Shieh Lee [2019] 3 CLJ 729 FC ***(refd)***
Sambaga Valli KR Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal [2017] 1 LNS 500 CA ***(refd)***
Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor [1973] 1 LNS 146 HC ***(refd)***
Syed Nadri Syed Harun & Anor v. Lim Guan Eng & Other Appeals [2019] 2 CLJ 631 CA ***(refd)***
TAZ Logistics Sdn Bhd v. TAZ Metals Sdn Bhd & Ors [2019] 2 CLJ 48 CA ***(refd)***
Tenaga Nasional Bhd v. Bukit Lenang Development Sdn Bhd [2019] 1 CLJ 42 FC ***(refd)***
Utusan Melayu (Malaysia) Bhd & Ors v. Tjanting Handicraft Sdn Bhd & Anor [2005] 1 CLJ 71 CA ***(refd)***

Legislation referred to:
Child Act 2001, s. 31
Defamation Act 1957, s. 5

Other source(s) referred to:
Clerk & Lindsell on Torts, 22nd edn, pp 1026, 1220
Gatley on Libel & Slander, 12th edn, pp 179-180

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JUDGMENT

Quay Chew Soon JC:

Introduction

[1] The plaintiff's ("P") main claim against the first defendant ("D1") and second defendant ("D2") is for slander. D1 and D2 are sisters, and are collectively referred to as the "defendants".

[2] The alleged slander occurred during an incident on 7 July 2017 ("incident") at the Sungai Buloh Hospital ("Sg Buloh Hospital") paediatric wardroom, where the defendants uttered allegedly defamatory words against P in the presence of various people. P seeks general, aggravated and exemplary damages and an apology from the defendants.

[3] In addition, P has a claim against D2 for conversion and trespass to property, and seeks the return of the property or alternatively their value in the sum of RM626,824.27 and damages.

[4] The defendants, in turn, filed a counterclaim for damages against P for allegedly causing physical injury to the defendants.

[5] The trial was previously part-heard by another judge and then continued before me. I allowed P's claim for slander against the defendants. However, I dismissed P's claim for conversion and trespass to property against D2. I also dismissed the defendants' counterclaim against P. These are the grounds of my judgment.

Background

[6] On 18 August 2007, P married Maya binti Ahmad Fuad ("wife"). P and wife were gifted with two children, namely (i) Misha binti Hisham (four years old at the material time) ("older child") and (ii) Myra binti Hisham (two years old at the material time) ("younger child"). Older child and younger child are collectively referred to as the "children".

[7] On 20 February 2017, wife left the matrimonial home at Hampshire Park Apartment ("apartment"), taking the children with her and went to stay at D2's house. D2 is wife's mother. On 22 February 2017, wife commenced proceedings in the Selangor Syariah Court for divorce and custody of the children. On wife's application, the Syariah Court by an *ex parte* order dated 23 February 2017 ("*ex parte* order") gave her interim custody of the children. P was given visitation rights, provided he first informed and obtained consent of wife and provided further that the children were accompanied by wife or her representative during the visitation.

[8] On 21 March 2017, the Syariah Court, on P's application, amended the *ex parte* order ("amended *ex parte* order") and gave P overnight visitation rights for two nights each week, from 5pm on Thursday until 5pm on Saturday. Pursuant to the amended *ex parte* order, the children would be picked up weekly by P from D2's house at 5pm on Thursday and returned at 5pm on Saturday. The defendants both admitted in court that they were aware of P's overnight visitation rights under the amended *ex parte* order.

[9] On 30 June 2017, P received a call from an officer of Polis Diraja Malaysia ("PDRM"), Inspector Imolly Anak Merka ("lnsp lmolly") from the Shah Alam District Police Headquarters. lnsp Imolly informed P that wife had lodged a police report, alleging that older child had been sexually assaulted by a driver employed by P's family ("driver"). The alleged molestation ("alleged molestation") was said to have taken place at the house of Tan Sri Halim Mohammad ("TSH"), who is P's father, between 22 June 2017 to 24 June 2017 whilst the children were with P and his family.

[10] According to P, he knew that the alleged molestation was not true based on the following.

(i) The children were with P at all times and had no contact with driver. On 22 June 2017 at around 5pm, P picked up the children from wife and they were driven by P's own driver ("P's driver"). P and the children went to TSH's house and spent the night there.

(ii) On 23 June 2020, P took the children to KLCC and Pavilion shopping mall. Again they were driven by P's driver. Thereafter, they went back to P's apartment (not to TSH's house) and remained there until they were returned to wife on 24 June 2020.

(iii) The interior and exterior of TSH's house are equipped with CCTV. The CCTV recording does not show the alleged molestation taking place.

(iv) Even after the alleged molestation was said to have taken place, the children stayed with P on 27 June 2017 and 28 June 2017 and were both in good spirits.

[11] From July 2017, wife and her family allegedly prevented P from seeing the children.

(i) Wife and her family, including D2, allegedly prevented P from being involved in the investigation of the alleged molestation, this included the clinical examination of older child at the Shah Alam Hospital and the interview of older child at the child interview centre. This was despite the fact that Insp Imolly had allowed P to be involved, since he is older child's father and is not a suspect.

(ii) On Thursday 6 July 2017, wife informed P that older child was under the care of Jabatan Kebajikan Malaysia ("JKM") and hence, P was prevented from taking the children for usual overnight visitation. P immediately contacted JKM and spoke to Nithiah a/p Palaniandy ("Nithiah"), a Pegawai Kebajikan Masyarakat. Nithiah subsequently invited P to a meeting at Sg Buloh Hospital, where older child was undergoing a clinical examination.

(iii) Although younger child was well and was not under the care of JKM, wife and her family had briefly admitted younger child into Sg Buloh Hospital, allegedly to deny P his overnight visitation rights. The defendants subsequently tried to prevent P from taking younger child home.

[12] P arrived at Sg Buloh Hospital sometime in the evening of 6 July 2017. P met with JKM officers, medical personnel (Dr Siah and Dr Tinh) and PDRM officers (ASP Chang and Insp Imolly). It was agreed that P would be allowed to take younger child home on the morning of Friday 7 July 2017, which was his visitation day under the amended *ex parte* order, since younger child was neither under the care of JKM nor involved in PDRM's investigation.

[13] On 7 July 2017, P went to Sg Buloh Hospital together with TSH, his younger brother Hazlan bin Halim ("Hazlan") and his Syariah lawyer. P met with the Sg Buloh Hospital Director, Dr Khalid Ibrahim ("Dr Khalid"), a PDRM officer from IPD Shah Alam (ASP Daniel Abdullah ("ASP Daniel") and Nithiah. During this meeting, P was again given permission to take younger child home.

[14] Following the meeting, the incident that transpired at the Sg Buloh Hospital paediatric wardroom was contemporaneously captured in a video recording ("video recording") and can be summarised as follows:

Minutes	Events from Video Recording
00:00 - 00:28	P walks with Nithiah and ASP Daniel towards the wardroom.
00:28 - 1:12	P does not immediately enter the wardroom. Doctors, nurses, the children, the defendants, other relatives of wife, and a domestic helper ("Domestic Helper") of D1's daughter Sophia, are seen inside the room. P informs a nurse outside the wardroom that he wishes to speak with the doctor. The nurse enters the room and informs Dr Jamaluddin bin Haji Mohamad, Head of Paediatrics Department ("Dr Jamaluddin"), who comes out. P introduces himself and seeks permission to take younger child.
4.05	The curtain is closed to prevent P from looking inside.
1:12 - 6:45	P waits outside the wardroom.
6:46 - 7:26	After waiting outside for about 5 minutes, P obtains permission from Nithiah and ASP Daniel to enter the wardroom. He enters the wardroom and heads towards the end of the room. He does not enter the curtained area where the children were. He then informs Dr Them Won Weng ("Dr Them"), a Medical Officer, that he only wants to take younger child, and that younger child is not admitted into the Hospital.
7.37	D2 closes the curtain to prevent P from talking to younger child when P calls for her.
7.53	P enters the curtained area. D1 repeatedly taps P on his shoulder.
8:14 - 8:49	P reaches out to younger child but D2 carries her away. D2 refuses to let P carry younger child, despite his repeated requests and explanation that he is allowed to take younger child.
8.50	P informs Dr Jamaluddin in the presence of the defendants that he has permission from Dr Khalid to take younger child, otherwise it will amount to a breach of the Amended *Ex Parte* Order.
8.52	The Domestic Helper holds younger child on her lap in the wardroom.
10.24	After being denied his right to take younger child, P calls TSH and asks TSH to inform Dr Khalid that P is not being allowed to take younger child.
10.35	A man identified as D2's husband's brother-in-law ("Bro-in-law") is sitting inside in the wardroom.
10:34 - 12:40	P asks to carry younger child, but D2 prevents him from doing so by walking away from him while carrying younger child.
12:40 - 13:55	D2 finally relents and allows P to carry younger child. P plays with the children.

11:50 - 19:00	The defendants make a series of remarks against P in full view and hearing of the children, Sophia, Bro-in-law, Domestic Helper, Nithiah, doctors and nurses.
11:50	D2 says: "No Hisham, what happened to your daughter ... You didn't protect her".
13.55	D2 says: "Hisham, she is afraid, Hisham you never protect her".
14:23 - 14:59	D2 says: "And she said Mika was there too with Veera". "Did you know that Veera asked her to take off her panties". "Hisham, Veera tell her to take off her panties". "Hisham, you should listen to your daughter not your driver". "When she grows up, you know what she will do to you".
14.23	P says to D2, "I'm not addressing any of these comments".
14:27	D1 says: "Hisham, just protect your children. If it happened, it happened (only once)".
15:08	D2 says: "Hisham you did not protect your daughter, someone wanted to rape your daughter Hisham".
15:44	D1 says: "You are not the Hisham that we used to know, seratus kali baik Hazlan daripada kau. You acted so well over the years, the best actor".
16.00	Sophia and her baby are seen.
16.29	Nithiah is seen.
16:06 - 16:54	D1 says: "Tengok ini, dia kurang ajar ... Aku dah suruh Yong bagi baby dekat dia, dia boleh buat perangai macam ini. Apa punya manusia engkau ini". "Bukan manusia kau ini". "Engkau tak berterima kasih. Look at your brother". "Mati dekat akhirat engkau kena jawap dengan tuhan".
16:59	D1 says: "Anak engkau nak dirogol".
17:00	D1 takes younger child from P's arms. Younger child starts crying.
17:08	D1 says: "1 don't want them to rape my cucu saudara".
17.15	Dr Jamaluddin and nurses are seen.
18: 36	Dr Khalid is seen and he allows P to take younger child, telling P "you can take".
19:00	D1 says: "We also protecting them from being raped".
19:00 - end of video	P tries to leave the wardroom with younger child. The defendants try to prevent P from leaving. P finally manages to leave with younger child.

Plaintiff's Case

[15] P avers that the following statements made by the defendants are slanderous (collectively the "impugned words").

Impugned Words by D1

(a) Hisham, just protect your children. If it happened, it happened (only once).

(b) You are not Hisham that we used to know, seratus kali baik Hazlan daripada kau. You acted so well over the years, the best actor.

(c) Tengok ini, dia kurang ajar ... Aku dah suruh Yong bagi baby dekat dia, dia boleh buat perangai macam ini. Apa punya manusia engkau ini.

(d) Bukan manusia kau ini.

(e) Engkau tak berterima kasih. Look at your brother.

(f) Mati dekat akhirat engkau kena jawap dengan tuhan.

(g) Anak engkau nak dirogol.

(h) I don't want them to rape my cucu saudara.

(i) We also protecting them from being raped.

Impugned Words by D2

(a) No Hisham, what happened to your daughter. .. You didn't protect her.

(b) Hisham, she is afraid, Hisham, you never protect her.

(c) And she said Mika was there too with Veera.

(d) Did you know that Veera asked her to take off her panties.

(e) Hisham, Veera tell her to take off her panties.

(f) Hisham, you should listen to your daughter not your driver.

(g) When she grows up, you know what she will do to you.

(h) Hisham you did not protect your daughter, someone wanted to rape your daughter Hisham.

[16] P contends that the sting of the impugned words gives rise to the following natural and ordinary meanings which are defamatory.

Impugned Words	Ordinary and Natural Meanings
D1 *"Hisham, just protect your children. If it happened, it happened (only once)"*	• P is an irresponsible father and careless in taking care of the Children. • P is a father who cannot and/or refuses to protect the Children from harm or more specifically, molestation. • P is a father who exposes the Children to harm/sexual abuse or permits the Children to be so disturbed/abused by outsiders. • P is concealing the Alleged Molestation. • P is a useless person. • P has failed as a father to the Children.
"You are not Hisham that we used to know, seratus kali baik Hazlan daripada kau. You acted so well over the years, the best actor"	• P is a double-faced person and cannot be trusted. • P is an individual who does not have moral values and has a bad character. • P does not have integrity and is dishonest and untrustworthy. • P is an unethical person.
"Tengok ini, dia kurang ajar... Aku	• P is an individual who does not have moral values and has a bad character/behaviour.

dah suruh Yong bagi baby dekat dia, dia boleh buat perangai macam ini. Apa punya manusia engkau ini"	• P does not have integrity and is dishonest and untrustworthy. • P is an unethical person.
"Bukan manusia kau ini"	• P is inhumane. • P is an individual who does not have moral values and has a bad character. • P does not have integrity and is dishonest and untrustworthy. • P is an unethical person.
"Engkau tak berterima kasih. Look at your brother"	• P is an individual who does not have moral values and has a bad character. • P does not have integrity and is ungrateful. • P is an unethical person.
"Mati dekat akhirat engkau kena jawap dengan tuhan"	P will be answerable to God for his actions in: • being an irresponsible father and careless in taking care of the Children. • being a father who cannot and/or refuses to protect the Children from harm or more specifically, molestation. • being a father who exposes the Children to harm/sexual abuse or permits the Children to be so disturbed/abused by outsiders. • attempting to conceal the Alleged Molestation. • failing in his duties as a father to the Children. • being inhumane. • being an individual who does not have moral values, has a bad character, has no integrity and is dishonest, untrustworthy and unethical.
"Anak engkau nak dirogol"	• P is an irresponsible father and careless in taking care of the Children. • P is a father who cannot and/or refuses to protect the Children from harm or more specifically, rape. • P is a father who exposes the Children to harm/sexual abuse or permits the Children to be so disturbed/abused by outsiders. • P is a useless person and has failed as a father to the Children.
"I don't want them to rape my cucu saudara"	• P is an irresponsible father and careless in taking care of the Children. • P is a father who cannot and/or refuses to protect the Children from harm or more specifically, rape. • P is a father who either sexually abuses or exposes the Children to harm/sexual abuse or permits the Children to be so disturbed/abused by outsiders.

	• P is a useless person and has failed as a father to the Children.
"We also protecting them from being raped"	• P is an irresponsible father and careless in taking care of the Children. • P is a father who cannot and/or refuses to protect the Children from harm or more specifically, rape. • P is a father who exposes the Children to harm/sexual abuse or permits the Children to be so disturbed/abused by outsiders. • P is a useless person and has failed as a father to the Children.
D2 *"No Hisham, what happened to your daughter… You didn't protect her"*	• P is an irresponsible father and careless in taking care of the Children. • P is a father who cannot and/or refuses to protect the Children from harm or more specifically, molestation. • P is a father who exposes the Children to harm/sexual abuse or permits the Children to be so disturbed/abused by outsiders. • P is a useless person and has failed as a father to the Children.
"Hisham, she is afraid, Hisham, you never protect her"	• P is an irresponsible father and careless in taking care of the Children. • P is a father who cannot and/or refuses to protect the Children from harm or more specifically, molestation. • P is a father who exposes the Children to harm/sexual abuse or permits the Children to be so disturbed/abused by outsiders. • P is a useless person and has failed as a father to the Children.
"And she said Mika was there too with Veera" *"Did you know that Veera asked her to take off her panties"* *"Hisham, Veera tell her to take off her panties"*	• P is an irresponsible father/uncle and careless in taking care of the Children or his nephew, Mika. • P is a father/uncle who cannot and/or refuses to protect the Children or nephew from harm or more specifically, molestation. • P is a father/uncle who exposes the Children and Mika to harm/sexual abuse or permits the Children/nephew to be so disturbed/abused by the Driver. • P is a useless person and has failed as a father/uncle.
"Hisham, you should listen to your daughter not your driver"	• P is an irresponsible father and careless in taking care of the Children. • P does not trust his own daughter. • P is a father who cannot and/or refuses to protect the Children from harm or more specially, molestation.

	• P is a father who exposes the Children to harm/sexual abuse or permits the Children to be so disturbed/abused by the Driver. • P is a useless person and has failed as a father to the Children.
"When she grows up, you know what she will do to you"	• P is an irresponsible father and careless in taking care of the Children. • P is a father who cannot and/or refuses to protect the Children from harm. • P is a useless person and has failed as a father to the Children.
"Hisham you did not protect your daughter, someone wanted to rape your daughter Hisham"	• P is an irresponsible father and careless in taking care of the Children. • P is a father who cannot and/or refuses to protect the Children from harm or more specifically, rape. • P is a father who exposes the Children to harm/sexual abuse or permits the Children to be so disturbed/abused by outsiders. • P is a useless person and has failed as a father to the Children.

The Law

[17] If a defamatory imputation is conveyed by spoken words or gestures, it is slander. *Clerk & Lindsell on Torts* (22nd edn, p. 1026) states:

> Slander distinguished from libel. Slander is defamation communicated in some non-permanent form by spoken words, or other sounds, or by gestures.

[18] In *Pardeep Kumar Om Parkash Sharma & Anor v. Abdullah Sani Hashim & Another Appeal* [2008] 1 LNS 669; [2009] 2 MLJ 685 at 701, the Court of Appeal explained the elements of slander as follows:

> [24] To succeed in an action of slander, as in libel, a plaintiff has to prove that the matter complained of, which emanated from the defendant **is defamatory, refers to him (an issue of identification) and was transmitted to a third person (publication)**. The burden of establishing those ingredients at the outset rests on the plaintiff. Thereafter, **if the plaintiff has succeeded in establishing the three ingredients, certain presumptions in favour of the latter then follows**, namely that the **matter complained of is true**, and that **in actions of slander where it is actionable *per se*, damage was caused to the plaintiff**. The defendant in defence must rebut and establish that the remarks made were true and that the plaintiff has suffered no damage.

[19] The test to be applied to determine whether the words complained of are defamatory is this. A statement is defamatory if it: (a) tends to lower the plaintiff in the estimation of right-thinking members of society generally; (b) causes the plaintiff to be shunned or avoided; (c) exposes the plaintiff to hatred, contempt or ridicule; or (d) imputes to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part.

[20] In *Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 1 LNS 146; [1973] 2 MLJ 56 at 58, the High Court said:

> Thus, the test of defamatory nature of a statement is its **tendency to excite against the plaintiff the adverse opinion of others**, although no one believes the statement to be true. Another test is: would the words **tend to lower the plaintiff in the estimation of right-thinking members of society generally?** The typical type of defamation is an attack upon the moral character of the plaintiff attributing **crime, dishonesty, untruthfulness, ingratitude** or cruelty.

[21] In *Chok Foo Choo v. The China Press Bhd* [1999] 1 CLJ 461 at 467; [1999] 1 MLJ 371 at 374, the Court of Appeal said:

> In my judgment, the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any **dishonourable or discreditable conduct** or motives or a **lack of integrity** on his part? If the question invites an affirmative response, then the words complained of are defamatory.

[22] In *Bre Sdn Bhd & Ors v. Tun Datuk Patinggi Hj Abdul Rahman Ya'kub* [2005] 2 CLJ 645 at p. 651; [2005] 3 MLJ 485 at 490, the Court of Appeal said:

> [10] In coming to his findings we are of the opinion that the learned judge had adopted the correct test ie, *whether the words complained of were calculated to expose the plaintiff to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right thinking members of society generally*.

Findings Of The Court – Slander

[23] P has to establish three elements in order to prove his case for slander. Namely: (i) the impugned words are defamatory; (ii) the impugned words refer to him; and (iii) the impugned words were transmitted to third parties.

[24] Limb (ii) above is undisputed. The defendants admitted in court that the impugned words were about P. Moreover, the contents of the impugned words make this clear.

[25] Limb (iii) above is indisputable. The impugned words were uttered by the defendants in the presence of and were heard by the children, bro-in-law, Sophia, domestic helper, Dr Khalid, Nithiah, doctors and nurses who were in the paediatric wardroom. This is evident from: (a) the video recording, (b) the testimonies of Dr Khalid, Nithiah and Insp Imolly as well as (c) the admission of the defendants during cross-examination.

[26] Thus, the only element to be decided is whether the impugned words are defamatory. In determining whether the impugned words convey defamatory meanings, I must objectively look at the natural and ordinary meaning of the impugned words (which may be literal, implied or inferred) from the viewpoint of a reasonable man. To see if it tends to lower P in the estimation of right-thinking members of society or exposes P to ridicule, contempt or hatred.

[27] As stated in *Chok Foo Chao* (*supra*) at p. 446 (CLJ); p. 374 (MLJ):

> ... the first task of a court in an action for defamation is to determine whether the words complained of are capable of bearing a defamatory meaning. And it is beyond argument that this is in essence a question of law that turns upon the construction of the words published. As Lord Morris put it in *Jones v. Skelton* [1963] 3 All ER 952 at p. 958:
>
> > The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning; any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words (see *Lewis Daily Telegraph Ltd* [1963] 2 All ER 151). The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader, guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction, would draw from the words.

[28] I find that the impugned words are capable of bearing a defamatory meaning and that they are indeed defamatory of P. The impugned words do tend to lower P in the estimation of right-thinking members of society generally. Their ordinary and natural meaning impute to P a conduct which is dishonourable, discreditable, irresponsible, inhumane, immoral and unethical. The impugned words do expose P to ridicule, contempt or hatred. They are a direct attack on P's behaviour, character, integrity and trustworthiness.

[29] This is substantiated by the evidence of Nithiah, who was present in the paediatric wardroom and heard the impugned words being uttered. Nithiah, who is an independent JKM officer, testified that the impugned words were "derogatory and not pleasant especially in presence of others".

[30] It is therefore my finding, on a balance of probabilities, that D has committed the tort of slander against P.

Defendants' Defence

[31] The pleaded defences are fair comment and qualified privilege. The burden of proving these defences rests entirely on the defendants. In *International Times & Ors v. Leong Ho Yuen* [1980] 1 LNS 31; [1980] 2 MLJ 86, the Federal Court held that the burden of proof for the defence of fair comment lies on the defendant. The court said at p. 87:

> The **appellants** in the present appeal **relied on** justification and **fair comment**. Therefore, the **burden of proving these defences rests entirely upon them**.

[32] In *Ayob Saud v. TS Sambanthamurthi* [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321; [1989]1 MLJ 315, the High Court held that the burden of proof for the defence of qualified privilege lies on the defendant. The court said at p. 324 (CLJ); p. 316 (MLJ):

> Where a defence of qualified privilege is set up, as in the present case, the burden lies on the defendant to prove that he made the statement honestly, and without any indirect or improper motive.

Findings Of The Court – Fair Comment

[33] To succeed in the defence of fair comment, the defendants must establish that: (i) the words complained of are comment, although they may consist or include inferences of fact; (ii) the comment is a matter of public interest; (iii) the comment is based on facts; and (iv) the comment is one which a fair-minded person can honestly make on the facts proved. (See the Court of Appeal case of *Dato' Sri Mohd Najib Tun Hj Abdul Razak & Anor v. Mohd Rafizi Ramli & Another Appeal* [2018] 4 CLJ 41; [2018] 1 MLJ 295 at 303).

[34] I find, on a balance of probabilities, that the defendants have failed to discharge their burden of proving the defence of fair comment. My reasons are as follows.

The Comment Is Not A Matter Of Public Interest

[35] In my view, the impugned words are not a matter of public interest. This is essentially a private family matter. A domestic dispute between a husband (ie, P) with his ex-wife (ie, wife) and her family (ie, the defendants). And P's responsibility and care (or alleged lack thereof) as a father of the children. It has been recognised by our courts that private matters in relation to arguments between family members, as in the present case, do not attract public interest. In *Mahadevi Nadchatiram v. Thiruchelvasegaram Manickavasegar* [2003] 4 CLJ 20 at p. 32; [2003] 4 MLJ 345 at 355, the Federal Court said:

> On the defendant's claim of fair comment for these statements I am puzzled over the existence of the element of public interest. **This matter certainly attracts no interest to the public; it is entirely a private family squabble**. (emphasis added)

The Comment Is Not Based On Facts

[36] I am of the view that the impugned words were not based on true facts. The underlying fact for the impugned words is that driver purportedly sexually assaulted older child. But the alleged molestation was not proven at trial. In the absence of factual basis for the comments to be made, the defence of fair comment must fail. In *Najib v. Mohd Rafizi* (*supra*), the Court of Appeal said at p. 52 (CLJ); p. 305 (MLJ):

> [23] … Without the underlying facts which could form the basis of a comment, the impugned statement cannot be said to be a comment that can qualify for a defence of fair comment.

[37] In *Dato' Seri Mohammad Nizar Jamaluddin v. Sistem Televisyen Malaysia Bhd & Anor* [2014] 3 CLJ 560; [2014] 4 MLJ 242 at p. 581 (CLJ); p. 258 (MLJ), the Court of Appeal said:

> [51] The comment must be based on true facts which are either contained in the publication or are sufficiently referred to. **It is for the defendant to prove that the underlying facts are true. If he or she is unable to do so, then the defence will fail**. (emphasis added)

[38] The defendants rely on the following pleaded 'facts' in support of their fair comment defence: (i) older child complained to wife that she was molested by driver; (ii) pursuant thereto, wife lodged a police report; (iii) older child, pursuant to the instructions of JKM and PDRM, was admitted to Sg Buloh Hospital to undergo a physical and emotional examination. (See paras. 37 and 60 of the amended defence). However, the truth of the facts upon which the comments were made were not proven at trial.

[39] As regards limb (i) above, older child was not called as a witness. The evidence led by the defendants and wife in respect of the alleged molestation is hearsay and therefore inadmissible. In this respect, D1 said that she was told by D2 of the alleged molestation. D2 said that she was informed by wife. Wife, in turn, said that she was informed by older child. In *Leong Hong Khie v. PP* [1984] 1 LNS 172; [1986] 2 MLJ 206 at 208, the Federal Court said:

> The general rule is that **hearsay evidence is not admissible as proof of a fact which has been stated by a third person**. This rule has been long established as a fundamental principle of the law of evidence. To quote Lord Normand in *Teper v. R*:
>
> > The rule against the admission of hearsay evidence is fundamental. It is not the best evidence, and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken by another witness cannot be tested by cross-examination and the light which his demeanour would throw on his testimony is lost.
>
> In our opinion, another reason is the danger that hearsay evidence may be concocted, fabricated and tailored to suit the witness's testimony. Notwithstanding this general rule certain exceptions have been recognised upon the ground of necessity or convenience.
>
> > *Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement*. It is not hearsay and is admissible when it is proposed to establish by the witness, not the truth of the statement, but the fact that it was made.

[40] As regards limb (ii) above, following the police report that was lodged by wife, Insp Imolly confirmed that investigations were conducted and the outcome was that no further action was taken against driver. This indicates that the alleged molestation was without basis. Furthermore, a domestic inquiry held by driver's employer found no misconduct on the part of driver.

[41] As regards limb (iii) above, there was no medical report adduced by the defendants to prove that the alleged molestation had taken place. Dr Them, who conducted a physical examination of older child, confirmed that it was only a case of suspected molestation as there was "no abnormality detected, no bruises/redness at perineum, hymental ring intact". Older child was then referred to the paediatric psychiatry unit at Hospital Selayang for further psychiatric evaluation. However, no evidence of such psychiatric evaluation and its outcome was produced. During cross-examination, Dr Them testified as follows.

Q: But you would agree with me that the final diagnosis rests very much in the hands of a child psychiatrist?

A: Yes, I agree.

Q: Yes?

A: Yes.

Q: Because your physical examination revealed no injury to the child, correct?

A: Correct.

Q: And the physical examination by the obstetrics and gynaecological department also revealed no physical injuries to the child?

A: Yes.

Q: So when there are no physical injuries, what is left is a psychological issue that must be investigated by a specialist, by a consultant child psychiatrist, which is something that would have been available at Hospital Selayang?

A: Yes, true.

Q: And that is the reason why the diagnosis in your report merely says suspected sexual abuse and not confirmed sexual abuse?

A: Yes.

The Comment Is Not One Which A Fair Minded Person Can Honestly Make On The Facts Proved

[42] Even if the alleged molestation was true, I think the impugned words are not one which a fair-minded person can honestly make, seeing as P was neither the accused nor a suspect. In this regard, Nithiah (JKM officer) testified during cross-examination that the defendants' reactions towards P were not normal among family members where there have been alleged molestation incidents involving children.

Q: It is normal, if your child is being molested, for example, don't you think you will, she will behave in the same way like that?

A: The thing is the father is not the alleged perpetrator.

Q: I am asking you, I am asking whether ... I am asking is it normal behaviour for us to go, emotions to run high, when you come to know the child is being molested? Is it normal? Since your experience in JKM, I am sure you have seen these kind of cases everyday. So, is it normal, it is normal, right for people, for emotion to run high when they come to know their child is being molested? Is it normal, yes or no?

A: It is **not normal within the family members, no**.

[43] It seems to me that the impugned words are essentially criticisms and accusations, and not really opinions or comments. The defence of fair comment cannot be invoked when the impugned words exceed the bound of just criticism. In *Utusan Melayu (Malaysia) Bhd & Ors v. Tjanting Handicraft Sdn Bhd & Anor* [2005] 1 CLJ 71; [2005] 2 MLJ 397 at p. 79 (CLJ); 405 (MLJ), the Court of Appeal said:

> [10] On the subject of fair comment, we agree with the learned trial judge that the **words complained of far exceeded the bound of fair comment and just criticism**. The usage of the words such as 'Hodoh', 'rupa yang buruk', 'sakit hati melihat', 'siapalah yang mencipta baju batik itu?', 'corak tidak halus', 'paduan warna tidak harmoni, tidak eksklusif', 'potongan pula tidak terletak di badan, meleweh, melendut, gedoboh, sendat', 'tidak bermutu', 'barang yang dijual di pasaraya borong lebih bermutu' are certainly words that tend to disparage the respondents in the world of batik fashion. The **language used was so extreme that no fair-minded person, however obstinate and prejudiced his views were, would have honestly used them** (*McQuire v. Western Morning News* (1903) 2 KB 100). The **words complained of were not in fact the genuine expression of the appellants' view** ...

[44] Similarly here, the language used by the defendants was rather extreme. The impugned words include: 'seratus kali baik daripada kau', 'kurang ajar', 'bukan manusia kau ini', 'mati dekat akhirat engkau kena jawab dengan tuhan', 'when she grows up, you know what she will do to you'. I do not think a fair-minded person can honestly make them. I believe the impugned words were uttered to criticise P's behavior and character, which stemmed from the fact that the defendants were unhappy with P. This was admitted as much by D1 during cross-examination.

Q: But you would agree with me that once there were marital problems, you no longer really liked Hisham very much, did you?

A: Well, from what I heard about what my sister went through with my niece, I was **very unhappy** then.

Q: In fact it would be natural for you as Maya's aunt and given that you were very close to Maya and your sister, to take Maya's side in the matrimonial dispute would not it. That would be a natural thing to do.

A: Yes Yang Arif.

Q: So, you made this statement, which is not about anything to do with the molestation or the alleged molestation, but it is a **personal attack on En Hisham**, is it not? You are not the Hisham we used to know. You are **criticising his conduct. His behaviour, his character**, isn't that correct?

A: **And for not being a responsible father**.

Findings Of The Court – Qualified Privilege

[45] A privileged occasion is one where the individual who makes a communication has an interest or duty (legal, social or moral) to make it to the person to whom it is made. And the person to whom it was made has a corresponding interest or duty to receive it. This reciprocity is essential. In *Henry Ong Keng Sem v. Patrick Ong King Kok* [2008] 4 CLJ 276; [2008] 7 MLJ 569 at pp. 291-292 (CLJ); pp. 583-584 (MLJ), the High Court said:

> A privileged occasion is, in reference to qualified privilege, an occasion where the **person who makes the communication has an interest or a duty, legal, social or moral, to make it** to the person to whom it is made, and the **person to whom it is so made has a corresponding interest or duty to receive it**. This **reciprocity is essential**.
>
> Elements of qualified privilege
>
> There are three elements necessary to establish the defence of qualified privilege: (1) the occasion must be fit, (2) the matter must have reference to the occasion, and (3) it **must be published 'from right and honest motives**'. (emphasis added)

[46] In *Financial Information Services Sdn Bhd v. Hj Salleh Hj Janan* [2012] 8 CLJ 885; [2012] MLJU 1761, the Federal Court reiterated the conditions for qualified privilege as follows:

> [17] The conditions for qualified privilege to arise as a defence was laid out long ago in *Toogood v. Spyring* [1834] 1 CM & R 181 and from this passage of Baron Parke's which has been described by Lindley L.J in *Stuart v. Bell* [1891] 2 QB 341 as having "been frequently quoted, and always with approval." That illustrious passage speaking of the publication of statements false in fact and injurious to the character of another states:
>
> > The law considers such publication as malicious unless it is **fairly made by a person in the discharge of some public or private duty**, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorised communications, and affords a qualified defence depending on the absence of actual malice. If **fairly warranted by any reasonable occasion or exigency, and honestly made**, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.

[47] Qualified privilege is afforded to those who make defamatory statements in the discharge of some public or private duty, whether legal or moral, or in the conduct of their own affairs, in matters where their interest is concerned. But only if the publication derived from right and honest motives. In *Dato' Dr Low Bin Tick v. Datuk Chong Tho Chin & Other Appeals* [2017] 8 CLJ 369; [2017] 5 MLJ 413, the Federal Court held that the defence is not available if the defendant has used the occasion for the wrong motive. The court said at p. 390 (CLJ); p. 435 (MLJ):

> [55] The *prima facie* defence of qualified privilege is not available if it is shown that a defendant has been actuated by actual or express malice or if he has **used the occasion for some indirect or wrong motive**. In *Royal Aquarium & Summer and Winter Garden Society v. Parkinson* (1892) 1 QB 43 Lopes LJ said:
>
> > Not only must the occasion create the privilege, but the occasion must be made use of bona fide and without malice. The defendant is only entitled to the protection of the privilege if he uses the occasion in accordance with the purpose for which the occasion arose. He is not entitled to the protection of the privilege if he uses the occasion for some indirect or wrong motive.

[48] Qualified privilege depends on the occasion upon which the communication is made, and not the communication itself. The communication must be made in pursuance of a duty or on a matter in which there was a common interest in the party making and the party receiving it. Whether an occasion is a privileged occasion depends on the circumstances of each case, the nature of the information and the relation of speaker and recipient. In *Dr Low* (*supra*), the Federal Court said at p. 387 (CLJ); p. 433 (MLJ):

> [46] **Qualified privilege depends on the occasion upon which the communication is made, and not the** communication **itself**. A qualified privilege occasion is an occasion where the person who makes a communication has an interest or a duty, legal, social or moral to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. If the *communication were made in pursuance of a duty or on a matter in which there was a common interest in the party making and the party receiving* it, the occasion is said to be one of qualified privilege. *Whether an occasion is a privileged occasion depends on the circumstances of each case, the nature of the information and the relation of speaker and recipient*. It is for the judge alone to determine as a matter of law whether the occasion is privileged ...

[49] I find, on a balance of probabilities, that the defendants have failed to discharge their burden of proving the defence of qualified privilege. My reasons are as follows.

[50] The defendants contend that they have a duty, as the grandaunt and grandmother respectively of older child, to guard older child's safety and welfare. And that they uttered the impugned words to P purely to protect older child. It seems to me however, that the impugned words were uttered by the defendants to criticise P and to stir sentiment against him. Being wife's mother and aunt, not surprisingly the defendants were biased against P in the matrimonial dispute. Their words and conduct showed that they were taking wife's side. They wanted wife to have custody over the children and were trying to prevent P from taking younger child, insisting that he should wait for wife even though they knew it was P's visitation day. They knew that on Friday, 7 July 2017, it was P's visitation day and P was allowed by the amended *ex parte* order as well as the authorities to take younger child. Even when the defendants were expressly and repeatedly informed about P's right to take younger child, they continued to obstruct P from taking younger child. I think the defendants used the occasion for such indirect or wrong motive.

[51] I accept that the defendants have an interest or a moral and social duty to communicate the alleged molestation to P. However, it is pertinent to note that neither of them attempted to speak privately to P about the alleged molestation. Instead, they uttered the impugned words in the presence and within earshot of various parties. In reality, the defendants were not communicating the alleged molestation to P. They were basically hurling criticisms and accusations against P in the presence and within earshot of other parties. This, in my view, did not fit the occasion at all. Given that P was only present at Sg Buloh Hospital on 7 July 2017 to take younger child in the exercise of his usual court-ordered overnight visitation rights (which the defendants were aware of), and with the consent of Dr Khalid, Nithia and PDRM, the occasion did not call for the defendants to utter the impugned words about P in the presence of third parties.

Malice Defeats Defences Of Fair Comment And Qualified Privilege

[52] Given my finding that the defences of fair comment and qualified privilege do not succeed, it is unnecessary for me to consider the issue of malice. But in case I am wrong in my conclusions, I will deal with this issue as well. My opinion is that the defendants cannot rely on the defences of fair comment and qualified privilege because the impugned words were actuated by malice. Malice defeats the said defences. In *Dato' Seri Mohammad Nizar Jamaluddin v. Sistem Televisyen Malaysia Bhd & Anor* (*supra*) at pp. 576-582 (CLJ); pp. 254-258 (MLJ), the Court of Appeal said:

> [34] In a **defence of qualified privilege**, truth is not a pre-requisite but it **can only succeed if there is no malice in such publication**.
>
> ...
>
> [51] ... **If the claimant can show that the publication was made maliciously, the defence of fair comment will not succeed**.
>
> ...

A [53] In this case, on the same reasons as above, pertaining to our findings on the defence of qualified privilege, the defendants, with respect, cannot succeed on the defence of fair comment because there was **malice that can be readily inferred from the surrounding circumstances** as found in the evidence pertaining to the publication of the defamatory statements against the plaintiff.

B

[53] In *Raub Australian Gold Mining Sdn Bhd v. Hue Shieh Lee* [2019] 3 CLJ 729; [2019] 3 MLJ 720, the Federal Court interpreted malice as being reckless or acting intentionally without just cause or excuse. The court said at pp. 745-746 (CLJ); p. 738 (MLJ):

C [40] 'Malice' has been judicially interpreted by the courts as **being reckless**, unreasonable, prejudice or unfair belief in the truth of the statement. 'Malice' may be established by showing that the defendant did not believe in the truth of what he uttered ...

[41] As defined in the *Osborn's Concise Dictionary* (7th Ed) the word 'malice' means:

D

Ill-will or evil motive: personal spite or ill-will sometimes called actual malice, express malice or malice in fact. ...

[42] In law an act is *malicious if done intentionally without just cause or excuse*. So long as a person believes in the truth of what he says and is not

E reckless, 'malice' cannot be inferred from the fact that his belief is unreasonable, prejudiced or unfair ...

[54] My view is that the defendants were indeed reckless in uttering the impugned words. They did so intentionally without just cause or excuse. I infer malice from the following. The impugned words were unnecessarily

F offensive and abusive. The defendants uttered the impugned words without regard to and without verifying its truth or falsity. I am prepared to accept that the defendants genuinely believed the alleged molestation happened. But the impugned words they uttered went beyond the alleged molestation. They attacked P's character and behaviour. I believe the defendants were

G motivated by ill-will arising from their bad relationship and unhappiness with P. Their intention was to vent personal spite against P.

Damages For Slander

[55] As a general rule, slander is actionable only upon proof of special damage arising as the direct and natural result of the defamatory words.

H However, there are exceptions as recognised under the Defamation Act 1957 ("Defamation Act") and at common law. Whereby special damage need not be proven as it is presumed, and the cause of action for slander is complete upon proof of publication.

I *Section 5, Defamation Act*

[56] Section 5 of the Defamation Act ("s. 5 DA") provides that, where the words are calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of the

publication, slander is actionable *per se*. In my view, P's claim for slander is actionable *per se* without the need to prove special damage. P can rely on s. 5 DA even though the impugned words do not refer to him in his office, profession, calling, trade or business. This is expressly allowed by s. 5 DA which states:

> Slander affecting official, professional, or business reputation
>
> 5. In an action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of the publication, **it shall not be necessary to allege or prove special damage whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business**.
>
> (emphasis added)

[57] In *Cohen v. McEvoy* [2001] WASC 349, the Supreme Court of Western Australia said:

> [95] To my mind, it follows from these authorities that the words complained of in the present case can be characterised as a form of slander actionable *per se*. I have found that the words complained of were spoken and would convey to the mind of an ordinary bystander that the plaintiff was unable to pay his debts as they fell due, this being the pleaded imputation relied upon by plaintiff. I am satisfied that the plaintiff was engaged in trade or business. It appears from the reasoning in *Jones v. Jones* (*supra*) that the reputation of a trader is presumed to be affected by words alleging insolvency, notwithstanding that the imputation is not made about him expressly in his capacity of trader.

[58] P is a businessman and an executive director and the chief executive officer of the Halim Mazmin Group of companies involved in shipping, aviation, education and training, tourism and hospitality industries. P is also a director and the accountable manager of Prima Air Sdn Bhd ("PrimaAir"), a chartered flight company which provide air ambulance flight services by transporting patients requiring emergency treatment from luxury resort islands (such as Pulau Langkawi and Redang) to Government and private hospitals (including Sg Buloh Hospital) for further medical treatment. Being the face of PrimaAir, P was known to some of the medical staff at Sg Buloh Hospital. This was corroborated by Dr Khalid who confirmed that he knew P's business was in respect of the medical industry, particularly with regards to medical evacuation, because one of his colleagues used to work for P.

[59] Seeing as the impugned words were uttered in the presence of doctors and nurses of Sg Buloh Hospital and Dr Khalid, this disparages P (who has dealings with Sg Buloh Hospital through PrimaAir) in his office, profession, calling; trade or business. This is so notwithstanding that the impugned words do not explicitly refer to such office, profession, calling, trade or business. The impugned words portray an image that P is unable to care for or protect his own children and is untrustworthy and irresponsible. This is

capable of casting doubt as to his credibility and ability to run a business which involves caring for the needs of patients being transported to Sg Buloh Hospital.

Words Imputing Criminal Offence

[60] At common law, proof of special damage is not necessary where the defamatory words impute a criminal offence punishable by imprisonment. In *Francis Kimsai v. Judip Kini* [2012] 4 CLJ 774; [2012] MLJU 55, the High Court held that slanderous words imputing criminal offence punishable by imprisonment is actionable *per se* without proof of special damage. The court said:

> Are the impugned statements defamatory of the appellant? In my view they are. Any right thinking bystander would readily understand them to mean what the **respondent intended them to mean, i.e. that the appellant is a thief**. Given the bad blood between the respondent and the appellant, there can be no doubt that the words were spoken as words of abuse. **Theft is a criminal offence punishable with imprisonment. The words are therefore slanderous and actionable *per se* without proof of special damage**.

[61] The impugned words, in their ordinary and natural meaning, mean that P had failed to protect older child from being sexually assaulted. The defendants are effectively saying that P has committed a criminal offence which is punishable by imprisonment. This is because s. 31 of the Child Act 2001 provides that any person, having the care of a child, who neglects or exposes the child or acts negligently in a manner likely to cause the child physical or emotional injury, or permits the child to be so abused, commits an offence. On conviction, such person shall be liable to a fine not exceeding RM50,000 or to imprisonment for a term not exceeding 20 years or to both.

Special Damage

[62] As such, the publication of the impugned words by the defendants in the presence of third parties gives rise to a presumption of damage, and there is no need for P to prove special damage. P argued that in any event, he has suffered special damage. I disagree for the following reasons.

Loss Of Close Relationship

[63] P contended that the defendants have caused a strain in his relationship with older child by uttering the impugned words within her earshot. Older child can be seen parroting the words of D2 in the video recording. P saw very little of older child after the incident, and has lost his good relationship and bond with her.

[64] I accept that loss of close relationship with family members due to slanderous words can constitute special damage. In *Pardeep Kumar* (*supra*), the minority judgment of the Court of Appeal said at p. 706 (MLJ):

> [38] I now return to the issue of damages to be imposed on the first appellant. As a result of this harrowing experience the respondent had suffered mental anguish and became unwell. His family likewise suffered embarrassment. His daughter had a difficult time in school and **his relationship with her became strained**. After resigning from his job he found difficulty in getting another because of the serious allegation cast at him.
>
> [39] By virtue of the presumption that damage had been caused by the appellants, let alone there was failure to rebut it, the next course of action was for the learned judge to assess the damage. ...

[65] Also in *Lynch v. Knight* (1861) [1861-73] All ER Rep Ext 2344, the House of Lords expressed the view that slanderous words spoken of a wife, occasioning special damage to her by depriving her of the consortium or conjugal society of her husband, is actionable.

[66] However, it was not proven that the loss of P's close relationship with older child caused by the impugned words. It could very well have been due to the divorce and custody battle between P and wife. During examination-in-chief, P testified as follows.

> Q: ... En Hisham, with regard to your answers in (ii) and (iii), you have mentioned connection with your children. Now, of course yesterday we witnessed the video where the various statements were made in the presence of both your children. My question is simply this. Since that incident on 07.07.2017, how has your relationship been with your older daughter, Misha?
>
> A: My Lady, I'm ... I have lost my good relationship and bond with my first daughter, My Lady since ... **not only since this incident, but since the very making of the police report on 30th June**, because I sincerely believe My Lady that all this was calculated plan to advance an unfair advantage to be used in the **Syariah proceedings surrounding our custody**, My Lady. The **police report and certain falsities which were at half-truths were put into affidavits and applications**, which were then used to try to restrict me from having any visitation rights whatsoever against my children. So, I've since lost contact with my eldest daughter, My Lady. And notwithstanding that there is an interim Syariah Order issued by the Syariah Appeals Court, that allows me to see my daughter for three hours twice a week, but in that time, I've ... it's not quality time with my daughter and she has ... I can see that **she has changed or she has suffered trauma and emotional distress out of what has happened**. And as I have mentioned earlier in my witness statement, since 19.06.2018, I have not seen my daughter. So that's almost seven months to date, My Lady.

[67] By P's own admission, his relationship with older child was affected by the divorce and custody proceedings between him and wife. Older child changed or suffered trauma and emotional distress "out of what has happened". That refers not just to the incident, but also to the divorce and

custody proceedings. As described by P, the divorce and custody battle was not pretty. There were "police report and certain falsities which were at half-truths were put into affidavits and applications". Naturally older child who is caught in the middle of it all would be traumatised and distressed. Thereby affecting her relationship with P.

Loss Of Business Opportunities

[68] According to *Gatley on Libel & Slander* (12th edn, pp. 179-180), "the requirement of special damage is satisfied where there is ... the loss of a client, or of commercial dealing". During cross-examination, P admitted that he "did not lose any contract" after the incident, but said that he "lost opportunities". However, no evidence was adduced to show the alleged lost opportunities. I therefore do not attribute any special damage based on such bare assertion.

Quantum of Damages

[69] In actions for defamation, damages are awarded to compensate the plaintiff for the injury to his reputation and the hurt to his feelings. They operate to vindicate the plaintiff to the public and to console him for the wrong done. (See *Cassell & Co Ltd v. Broome* [1972] 1 All ER 801). At the same time, the award of damages must not be exorbitant or excessive. Damages should be compensatory and not punitive.

[70] The following observation by the Court of Appeal in *Liew Yew Tiam & Ors v. Cheah Cheng Hoc & Ors* [2001] 2 CLJ 385 at 395 is instructive.

> In the process of making our assessment we have not overlooked the recent trend in this country of claims and awards in defamation cases running into several million ringgit. No doubt that trend was set by the decision of this Court in *MGG Pillai v. Tan Sri Data Vincent Tan Chee Yioun* (*supra*). It is a decision that has been much misunderstood. The underlying philosophy of that decision is that injury to reputation is as, if not more, important to a member of our society than the loss of a limb. But we think the time has come when we **should check the trend set by that case**. This is **to ensure that an action for defamation is not used as an engine of oppression**. Otherwise, the constitutional guarantee of freedom of expression will be rendered illusory.

[71] I considered the several factors that should be taken into account in assessing damages as stated by the Court of Appeal in *Chin Choon v. Chua Jui Meng* [2005] 2 CLJ 569 at 573. Namely: (i) the gravity of the allegation; (ii) the size and influence of the circulation; (iii) the effect of the publication; (iv) the extent and nature of the claimant's reputation; (v) the behaviour of the defendant; (vi) the behaviour of the claimant. I also looked at the trend of awards discussed by the Federal Court in *Datuk Harris Mohd Salleh v. Datuk Yong Teck Lee & Anor* [2018] 1 CLJ 145 at 207; by the Court of Appeal in

Karpal Singh Ram Singh v. DP Vijandran [2001] 3 CLJ 871; [2001] 4 MLJ 161 at 180, and in *Syed Nadri Syed Harun & Anor v. Lim Guan Eng & Other Appeals* [2019] 2 CLJ 631 at p. 649.

[72] In the instant suit, a relevant factor is that the impugned words were not widely transmitted. This is not a case where the words complained of were published to all and sundry by means of a newspaper publication, thereby bringing it into the public domain in permanent form. Here, utterance of the impugned words was restricted to about a dozen or so individuals. The size, influence and effect of the dissemination of the impugned words is therefore limited to that extent. As held in *Liew Yew Tiam* (*supra*) at p. 390, the width or extent of a publication is always a relevant consideration when assessing damages.

[73] Another relevant factor, in my mind, is that the impugned words were uttered in the context of a family altercation. The people who heard the impugned words were largely family members or relatives. It is true that there were some outside third parties ie, doctors, nurses and JKM officer. But they would be people 'in the know', so to speak. In the sense that they are likely to be cognizant of the matrimonial dispute between P and wife, which formed the background leading to the incident and the making of the impugned words. I think this mitigates the injury to P's reputation.

[74] The defendants are elderly ladies (age 60 and 62 respectively at the time of the incident). They have deep attachment to family members involved in the domestic squabble. From their perspective, the defendants were simply trying to protect their granddaughter and grandniece. Perhaps they were over-zealous in doing so, but understandably so. Emotions were running high and tempers were frayed at the time of the incident. The defendants were overwhelmed by their feelings and uttered the impugned words in the heat of the moment. The whole episode was most unfortunate. During their testimony in court, the defendants appeared regretful over the incident. This of course does not excuse their slander against P. But I think it counts towards quantum of damages.

[75] In the circumstances of this case, I consider an award of RM60,000 to be fair and reasonable. I do not consider a separate award for aggravated damages to be warranted. It would over-compensate P due to overlap as some of the 'aggravating' factors submitted by P have already been taken into account in general damages.

[76] I decline to award exemplary damages as the defendants' conduct were not outrageous or calculated to make a profit for themselves. Based on the principles of moderation and restraint, I do not see a need to be punitive or retributory against the defendants. (See the Court of Appeal cases of *TAZ Logistics Sdn Bhd v. TAZ Metals Sdn Bhd & Ors* [2019] 2 CLJ 48 CA; [2019] 3 MLJ 510; *Sambaga Valli KR Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal* [2017] 1 LNS 500; [2018] 1 MLJ 784).

[77] I also decline P's prayer for an apology as I consider that general damages will suffice.

Tort Of Conversion/Trespass

[78] P's case against D2 for the tort of conversion and/or trespass is this. On 20 February 2017 at around 3pm, D2 entered the apartment together with a few Chinese and Indonesian men ("workers"). D2 is not a resident of the apartment and did not have an entry access card. Therefore, her actions in entering the apartment constitutes an act of trespass. D2 instructed the workers to remove P's belongings as listed below ("items"):

No.	Items	Value (RM)
1.	Hermes Birkin Brown	23,501.76
2.	Hermes Birkin Green	39,400.00
3.	Hermes Birkin Orange	25,135.00
4.	Hermes Birkin Red	48,962.01
5.	Hermes Kelly Black	31,185.00
6.	Hermes Constance Pink	31,185.00
7.	Hermes Lindi Black	25,200.00
8.	Chanel Silver	18,837.50
9.	Chanel Pearl	18,837.50
10.	Chanel New	11,124.17
11.	Celine Black	12,650.00
12.	Celine Blue	12,650.00
13.	L V Keepall Bag	8,387.50
14.	Rolex Watch	33,294.16
15.	Hermes Watch	70,000.00
16.	Cartier Diamond Bracelet	39,278.00
17.	Cartier Diamond Bracelet	42,694.87
18.	Cartier Nail Bracelet	22,800.00
19.	Carpet	50,000.00
20.	Chest of Drawer	15,603.00
21.	Paintings	30,000.00
22.	MacBook Pro	6,799.00
23.	Iphone 7	4,299.00
24.	Ipad Mini	3,000.00
25.	Children's Toys	2,000.00
	Total	626,824.27

[79] P contends that D2 appropriated his items unlawfully and without his consent. As such, D2 is guilty of conversion and liable to compensate P for the loss of the items. According to P, the acts of trespass and unlawful appropriation are further compounded by the fact that D2 was seen paying money to the security guard.

[80] In her defence, D2 contends that the items belong to wife. Wife had requested D2's assistance to go to the apartment to help retrieve her items when wife left the apartment. D2 avers that she often stays at the apartment to babysit the children. In that connection, D2 had brought some of her own things ("D2's belongings") and placed them in the room where she sleeps in the apartment. In her amended defence and counterclaim, D2 in turn counterclaimed against P for damages arising from loss of use of D2's belongings. However, this counterclaim by D2 was not pursued at trial and was abandoned during submission.

[81] I find, on a balance of probabilities, that P has not proven trespass or conversion against D2. In law, a trespasser is one who wrongfully enters on land in the possession of another and has neither the right nor permission to be on the land. A trespasser is one who goes on the land without invitation of any sort and whose presence is either unknown to the proprietor or, if known, is practically objected to. (See the Federal Court case of *Tenaga Nasional Bhd v. Bukit Lenang Development Sdn Bhd* [2019] 1 CLJ 42; [2018] MLJU 1558).

[82] In my opinion, D2 can hardly be described as a trespasser. By P's own admission, D2 is permitted to be in the apartment. Paragraph 21 of P's reply states: "... plaintiff had in good faith allowed the second defendant to stay overnight in the apartment ...". Clearly D2 is not someone who had wrongfully entered the apartment. On the contrary, she had permission to be in the apartment. D2 was invited to stay at the apartment to babysit the children. Her presence there was known to and at the invitation of P. Prior to the divorce, the apartment was the matrimonial home of P and wife. It is pertinent to note that the alleged trespass occurred on the same day (ie, 20 February 2017) that wife left the apartment, taking the children with her to stay at D2's house. P himself said that when he came home at around 8:40pm that day, he discovered that wife and the children had left the apartment and the items had been taken away. In the circumstances, I do not consider D2 a trespasser.

[83] It is also my finding that D2 is not guilty of conversion. Conversion occurs when a person without authority receives or takes possession of another's good, with the intention of asserting some right or dominion over them or deals with them in a manner inconsistent with the right of the true owner. Provided there is an intention on the person so dealing with them to negative the right of the true owner or to assert a right inconsistent therewith. (See *Clerk & Lindsell on Torts*, 22nd edn, p. 1220).

[84] P had lodged a police report regarding the loss of the items but the police classified the case as NFA (no further action). P produced receipts showing proof of purchase of the items. But by their very nature, the items are not things that P would use or buy for himself. The items consist mainly of ladies handbags and bracelets (and children's toys). It is believable that the items belong to wife or were bought by P for wife. I accept that wife is the true owner of the items. I therefore accept D2's contention that she was helping to retrieve the items for the true owner. D2 had authority from the true owner to take possession of the items from the apartment. D2 did not negative the right of the true owner of the items or assert a right inconsistent therewith.

Defendants' Counterclaim

[85] The pleaded counterclaim by the defendants is that P "acted with violence and extreme physical force" which resulted in injury to them during the incident. However, the evidence led at trial shows that P was carrying younger child and therefore could not and did not act with physical force to cause injury to the defendants as alleged. There is no medical report to support the defendants' allegations of injury. During cross-examination, D2 admitted that P did not act with violence to cause her injury as alleged. The counterclaim by the defendants is therefore unsubstantiated.

Conclusion

[86] On a balance of probabilities, I find that P has proven his claim for slander against the defendants. On a balance of probabilities, I find that the defendants have failed to prove their defence of fair comment and qualified privilege. I ordered the defendants to pay a total sum of RM60,000 in general damages to P.

[87] I awarded interest at the rate of 5% per annum on the judgment sum from the date of judgment until the date of payment. I ordered the defendants to pay total costs of RM20,000 to P.

[88] On a balance of probabilities, I find that P has not proven his claim for trespass and conversion against D2. Hence I dismissed this claim by P.

[89] On a balance of probabilities, I find that the defendants have not proven their counterclaim for physical injury against P. I therefore dismissed this counterclaim by the defendants.